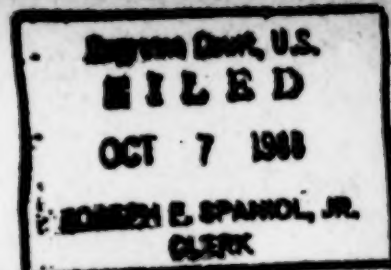


(5)
No. 87-1064



In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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1. In our opening brief (at 18-28), we argued that the district court, in an action to enforce a treaty summons, should not second-guess the determination of the competent authority that it is appropriate to honor a treaty partner's request for information. Both the structure of the 1942 Convention, which is typical of our tax treaties, and the nature of summons enforcement proceedings indicate that the district court should not undertake an independent examination of the treaty partner's request. The treaty is designed to be administered by the respec-

tive competent authorities; in particular, it directs the competent authority of the United States to furnish a treaty partner with requested information in the government's possession if the competent authority determines that the treaty request should be honored—without involving any other government entity in the process. The treaty does not indicate that the competent authority's determination as to the validity of the treaty request should be any less conclusive when it is necessary to issue a domestic summons to obtain the requested information. See U.S. Br. 18-21. Moreover, the established role of the district court in a summons enforcement proceeding is merely to determine whether the IRS has issued the summons in good faith; that inquiry necessarily focuses on the motivation of the IRS, which has issued the summons, and does not require any examination of the circumstances surrounding the treaty partner's request. The merits of the IRS's decision to issue a summons—in this case, the determination that the summoned information is needed to satisfy a valid treaty request, is not a proper subject for inquiry by the district court because the correctness of the IRS's determination that the information should be summoned is not an element of its good faith. See *id.* at 20-24. And there is nothing unusual about this deference to the Executive in matters of tax treaty administration; our system of government often reposes in the Executive, rather than the Judiciary, final responsibility for decisionmaking on particular matters implicating international relations, in order to further the sound administration of foreign policy. See *id.* at 24-27.

Respondents do not challenge any of these arguments made in our opening brief. Instead, they mis-

takenly suggest that we have argued that the “political question doctrine” prevents a district court from considering the validity of a treaty partner's request for information. Applying the analysis derived from *Baker v. Carr*, 369 U.S. 186 (1962), respondents then attack this strawman and argue that the validity of the information request of a tax treaty partner is not a “political question.” See Resp. Br. 8-10. We do not argue with respondents' conclusion concerning justiciability, except to note that it is entirely irrelevant to this case. If Congress had intended that a district court asked to enforce a treaty summons should make an independent examination into the validity of the treaty partner's request, and had so structured the treaty and the authority of the court, we agree that there would be no “political question” impediment to district court consideration of the issue. But Congress did not so intend and it did not so structure tax treaties and summons enforcement actions. Rather, as explained above and in more detail in our opening brief, it entered into a tax treaty that makes the competent authority the conclusive arbiter of whether a treaty partner's request for information should be honored, and it created a summons enforcement action in which the role of the court is limited to determining whether the summons was issued in good faith.

2. Respondents argue (Br. 11-15) that the tax treaty between the United States and Canada provides that the IRS cannot “obtain or provide information in a fashion inconsistent with United States summons enforcement law” (Br. 12). But respondents do not explain why the treaty provisions upon which they rely would be violated by enforcement of the summons in this case. United States law does

prohibit the enforcement of a summons where there is in effect a referral to the United States Department of Justice for criminal prosecution (see 26 U.S.C. 7602(c)), but it is undisputed that there has been no such referral here. Neither United States law nor the tax treaty requires as a prerequisite to honoring a request for information under the treaty that it be shown that the foreign government's investigation has not reached a stage analogous to a Justice Department referral. See U.S. Br. 30-38. Accordingly, enforcement of the summons in this case would not be "inconsistent with United States summons enforcement law," and the treaty provisions relied upon by respondents provide no reason to deny enforcement.¹

Respondents assert (Br. 15-16) that a foreign referral restriction should be read into the language of the tax treaty because it "can be easily applied" (Br. 15). First, of course, a restriction not contained

¹ At one point, respondents suggest (Br. 13) that the district court should inquire not only into whether the Canadian tax investigation had reached a point analogous to a Justice Department referral, but also, more generally, into whether the Canadian investigation suffered from a "lack of civil purpose." The premise of this suggestion is clearly mistaken. The Internal Revenue Code explicitly provides that the purposes for which the IRS may issue a summons "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws" (26 U.S.C. 7602(b)). Therefore, even if this case involved a domestic summons, the lack of a civil purpose for the investigation would not justify a denial of enforcement on the ground that the summons was issued for an improper purpose. Plainly, respondents err in stating (Br. 13) that the existence of a civil purpose for the foreign investigation is a prerequisite to invocation by a tax treaty partner of the treaty information exchange provisions.

in the treaty should not be read into it no matter how easily it can be applied; that would not be faithful to the intentions of the treaty partners, which in this case were to ease, not restrict, the flow of information. See U.S. Br. 31-33. In any event, respondents are clearly mistaken in stating that a foreign referral restriction could be easily applied. As we explained in our opening brief (at 39-42), the United States has entered into tax treaties with numerous nations whose governments in many cases are structured very differently from our own. Determining when a particular country's investigation has reached a stage analogous to a Justice Department referral in our system would be quite complex in many cases and perhaps impossible where the foreign government lacks the separation between civil and criminal tax authorities that is present in our government. Injecting a foreign referral inquiry into summons enforcement would substantially complicate and delay what is designed to be a summary procedure.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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